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No. 09-261

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

DESSIE WUBAYEH, DEGETNU T. SHIMEKACH, FRANCIS EFAGENE, SYLVESTER SUBERRO, MELAKU ASMAMAW, VERNON RICHARDS, OWEN GARRISON AND CLETUS AMAGWU,

Petitioners,

-v.-

THE CITY OF NEW YORK and REGGIE RIVERA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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October 1, 2009

QUESTION PRESENTED

Did the Circuit Court of Appeals correctly affirm the District Court's dismissal of the complaint under Rule 41(b) for failure to prosecute where the petitioners abandoned the action for four and one half years?

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BRIEF IN OPPOSITION TO PETITION

COUNTER-STATEMENT OF THE CASE

Petitioners Dessie Wubayeh, Degetnu T. Shimekach, Francis Efagene, Sylvester Suberro, Vernon Richards, Melaku Asmamaw, Owen Garrison, and Cletus Amagwu ("petitioners"), appeal from a final order, dated September 18, 2007, which granted the motion of respondents, the City of New York ("the City," or collectively with the late defendant Reggie Rivera, "respondents"),

for dismissal of the action for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure ("FRCP"). The United States Court for the Eastern District of New York (Trager, J.), held that petitioners' delay of over four years in pursuing the litigation was excessive and constituted grounds for dismissal, and dismissed the action as to the City and *sua sponte* as to the late Reggie Rivera, and the Court of Appeals for the Second Circuit affirmed.

Respondents request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's April 8, 2009 summary order in this case. The order below does not conflict with a decision of this Court or another court of appeals on any question petitioners attempt to formulate. Nor does the petition otherwise properly raise any other issue calling for this Court's exercise of its supervisory power.

Background

Petitioners are seven male livery cab drivers and the wife of one driver, who brought this action against the City and Reggie Rivera, a New York City police officer, now deceased, under 42 USC §1983, alleging that P.O. Rivera had committed violent sexual assault (forcible anal sodomy) or attempted sodomy, against each of the drivers while on duty and in uniform as a police officer, in Far Rockaway, Queens, on November 24, 1992; January 9 and January 28, 1993; an unspecified date in March or April, 1993; April 30, 1993, and November 7 or 14, 1993. On April 14, 1993, the first alleged victim filed a complaint with the Civilian Complaint Review Board ("CCRB")

alleging a sexual assault by P.O. Rivera three months earlier, followed by similar complaints lodged by the other six petitioners.

The Queens County District Attorney's Investigation

In response to these claims, the Queens District Attorney launched a lengthy investigation, which was completed on December 15, 1994. The 146-page report of the investigation consisted of extensive interviews with the alleged victims and their alleged witnesses as well as many other investigative procedures:

> In view of the seriousness of the charges, the investigation into the allegations has been extraordinarily painstaking and thorough and comprehensive in scope. The investigative steps have basically involved a twofold process: (1) inquiry into the allegation; and, (2) inquiry into Officer Rivera's whereabouts and his official duties on the dates in question. Each step was complicated, among other things, by the delay in the reporting of the allegations and the vagueness of times of the alleged attacks.
>
> A multitude of investigative techniques were utilized. They included personal interview, record reviews, DMV searches, surveillance, crime scene searches, canvassing for witnesses, use of expert consultants, random interviews and scientific testing.

In its conclusions, the Report summarized all the factors set forth above, concluding that there was absolutely no credible evidence to support the claims of the alleged victims. The Report also noted that there was considerable animosity between the group of illegal van drivers and P.O. Rivera, that was first manifested in the meeting organized by Wubayeh in August, 1992. At that meeting, Wubayeh urged drivers who had been ticketed or arrested by P.O. Rivera to file complaints against him. Several drivers did so, using fictitious names, addresses and telephone numbers. Thus, the Report concluded that Wubayeh had an inclination to file reports against P.O. Rivera long before he filed his first allegation of sexual assault on April 14, 1993. In addition, every one of the other alleged victims spoke to Wubayeh prior to going to anyone in law enforcement, as each of them admitted to Ms. Treacy and to the investigative team. This factor, known as "contamination," cast considerable doubt on the credibility of the alleged victims' accusations.

The Report also concluded that the investigation of P.O. Rivera's work showed that he could not possibly have been committing these sodomies during the times when there was documentary evidence that he was actually performing his daily work of either ticketing illegally parked vehicles or doing desk work. Furthermore, his profile was completely inconsistent with that of a serial sex offender, and he fully cooperated with the investigation, voluntarily submitting to various tests which he had no legal obligation to take.

The Report summarized the many instances of inherently incredible details in the claims of the alleged victims, including refusal to give their real names, changing their stories, inability to remember when the alleged attack occurred, unexplained inconsistencies in regard to the vans and to other details of their stories, unsubstantiated claims that eyewitnesses existed, and refusal of some of the alleged victims to admit that they knew the other alleged victims.

Litigation History

1. The Summons and Complaint

The Summons and Second Amended Complaint were filed on April 19, 1995. Petitioners brought this action pursuant to 42 U.S.C. § 1983, alleging that the City and P.O. Reggie Rivera violated their civil rights when defendant Rivera allegedly sexually assaulted petitioners while acting under color of state law. Petitioners alleged forty-one causes of action based on six instances of forcible sodomy, and one incident of sexual "groping" (Cletus Amagwu), committed by P.O. Rivera while on duty and in uniform as a police officer. In addition to the seven van drivers named in the caption, Wubayeh's wife, Degetnu T. Shimekach, sued for loss of consortium.

Defendants filed their Answer on June 5, 1993, denying the material allegations of the complaint.

2. The Bankruptcy Proceedings

On September 21, 1999, the litigation was stayed pending the resolution of a bankruptcy

proceeding brought by defendant Rivera. Following the lifting of the stay in May, 2000, at petitioners' request, the District Court reopened this action on April 23, 2001. There were no further proceedings until May 4, 2006, when petitioners requested and received an order from the District Court setting a schedule for the parties to file a Joint Pre-Trial Order. Shortly thereafter, on May 17, 2006, defendants' attorney, the New York City Corporation Counsel, learned that P.O. Rivera had died on August 19, 2000.

3. The Motion to Dismiss

On September 11, 2006, the City served its motion to dismiss for failure to prosecute, supported by a declaration of counsel, memorandum of law, the Queens DA's Report, and other documents. After briefly reviewing the facts of the case, the City argued that petitioners had effectively abandoned their case from 2001 until late 2005, and that the five factors to be considered in determining whether to dismiss a case for failure to prosecute, weighed in favor of dismissal: (1) the duration of petitioner's failure; (2) whether petitioner had received notice that further delay would result in dismissal; (3) whether defendant would be prejudiced by further delay; (4) the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard; and (5) the efficacy of lesser sanctions.

The City argued that the duration of petitioners' failure here was unusually long and well beyond the time lapse held in several cases to be unacceptable, citing cases where the action was

dismissed for failure to prosecute for periods of as little as four months, five months, six months, eight months, or ten months. As to notice, respondent argued that petitioners were represented by counsel at all times who were presumed to be familiar with FRCP 41(b). Respondent also cited the actual prejudice to their case, insofar as P.O. Rivera had died, the attorneys who had been assigned to this case originally and had personally interviewed P.O. Rivera, had gone, and other witnesses had retired from the police force and had not been located.

Respondent also argued that petitioners' failure to move the case along was related to the obvious lack of merit in petitioners' case, as shown by the results of the District Attorney's investigation and report. Thus, this case fit neatly into the category of cases where the Court's interest in moving cases forward outweighed petitioners' right to go to trial (A327). As to lesser sanctions, respondent argued that the prejudice it suffered as a result of the unconscionable delay militated against anything but dismissal.

Petitioners served a response to the City's motion on October 30, 2006. Supporting the motion was a declaration of counsel, a memorandum of law as well as numerous other documents, including an undated, unsigned 125-page critique of the DA's Report. Petitioners argued that respondent was not prejudiced by the delay, and that the witnesses could be located and subpoenaed. Petitioners further argued that P.O. Rivera's bankruptcy proceedings had halted the action because even though the stay on the matter herein was lifted in 2000, petitioners were required to attend the

bankruptcy proceedings in 2002, 2003 and 2004 in order to obtain a ruling as to the dischargeability of any award petitioners might obtain in this matter. Petitioners claimed that after obtaining such ruling from the bankruptcy court, they then reopened this case.

Additionally, petitioners argued that they had received no warning notice from the Court regarding the possibility of dismissal for failure to prosecute, and that respondents had done nothing to advance the case over the years, and that dismissal was a draconian sanction which would deny petitioners their day in court.

Respondent submitted a reply memorandum of law on October 30, 2006.

The District Court's Order

The memorandum and order of the United States Court for the Eastern District of New York (Trager, U.S.D.J.), granting respondents' motion for dismissal was entered on September 18, 2007 (Petition 5a-19a). The Court reviewed the procedural history of the case, which began with the filing of the initial sealed complaint on January 28, 1994 (Pet. 6a). The Court noted that the Queens County District Attorney conducted an extensive investigation, culminating in its December 15, 1994 Report that concluded there was no credible evidence to support the petitioners' allegations (Pet. 6a). The Court quoted the Report's further conclusion that petitioners, who were employed in the illegal livery van business, had a motive to bring down P.O. Rivera, who had "played an active and aggressive role in the police

crackdown on this illegal industry" by issuing thousands of summonses, seizing vans, and making arrests (Pet. 7a). This factor raised "the specter of fabrication" in this case (Pet. 7a).

The District Court then noted that the proceedings had halted when P.O. Rivera filed for bankruptcy, but that the stay on the litigation herein had been lifted on May 18, 2000. Eight months later, on February 21, 2001, petitioners requested the Court to reopen the case, which was granted on April 23, 2001. After requesting a trial schedule on June 29, 2001, petitioners fell silent until December 1, 2005, when petitioners' counsel forwarded its portion of the Pretrial Order to the City for completion and filing (Pet. 10a).

Holding that "[petitioners'] significant delay weighs overwhelmingly in favor of granting this motion to dismiss," the Court also held that during the five years preceding the bankruptcy stay, petitioners had not provided any credible evidence to refute the DA's Report exonerating P.O. Rivera (Pet. 12a-13a).

Analyzing the various aspects of petitioners' nearly four-and-one-half year delay, the Court noted that as soon as the bankruptcy stay was lifted, petitioners could have resumed the proceedings herein, even while continuing to pursue their claims in bankruptcy court (Pet. 13a). Indeed, the Court pointed out that the two-and-one-half year delay in bankruptcy court as to the issue of dischargeability was actually occasioned by petitioners' failure to follow the bankruptcy judge's instruction to settle an order after that court granted petitioners' motion for default judgment

(Pet. 14a). The Court also found that petitioners had not explained the sixteen-month delay between the bankruptcy court's dismissal of petitioners' motion for default judgment and the August 27, 2003 scheduling of a new pre-trial conference in that court (Pet. 14a). Finally, the Court also noted that petitioners had failed to explain their nineteen-month failure to act on the case herein following the dischargeability order issued by the bankruptcy court, a lengthy enough delay in itself to justify dismissal for failure to prosecute (Pet. 14a-15a).

The District Court also found that the delay herein prejudiced respondent, who had reasonably claimed to have been "more prepared to present this case to a jury five years ago, as opposed to today" (Pet. 15a).

In regard to the fact that petitioners had not been warned that dismissal was a possibility, the Court noted that petitioners were at all times represented by counsel, who could not reasonably expect that such a "lengthy abandonment" would not risk dismissal under Rule 41(b) (Pet. 16a-17a). Finally, the Court found there was no need for lesser sanctions where other, more pressing matters demanded the Court's attention, and petitioners had had sufficient time and opportunity to pursue claims that were unsupported by the available evidence (Pet. 17a).

The Order of the Circuit Court of Appeals

In an opinion issued on April 8, 2009, the United States Court of Appeals for the Second Circuit affirmed the District Court's order (Pet. 2a).

Citing United States ex rel Drake v. Norden Sys., Inc., 375 F3d 248 (2d Cir. 2004), the Court enumerated the five criteria to be considered (Pet. 2a):

> whether (1) the plaintiffs' failure to prosecute caused a delay of significant duration; (2) the plaintiffs were given notice that further delay would result in dismissal; (3) the defendants were likely to be prejudiced by further delay; (4) the district court carefully balanced the need to alleviate court calendar congestion against the plaintiffs' right to an opportunity for a day in court, and (5) the district court adequately assessed the efficacy of lesser sanctions.

Reviewing the District Court's decision for abuse of discretion, the Court found that there was no clear error in the District Court's emphasis on the petitioners' unreasonable delay and the resulting prejudice to the City (Pet. 2a). The Circuit Court found that the District Court did not err in finding that petitioners delayed over four years in taking any action in this lawsuit (Pet. 3a). The Court also found no clear error in the District Court's conclusion that the many delays in the bankruptcy proceedings themselves were petitioners' own fault (Pet. 3a).

The Circuit Court held that the District Court was within its discretion in holding that the prejudice resulting from the extremely long delay could be "presumed as a matter of law" (Pet. 3a). The Court concluded that the wide latitude accorded the District Court in deciding such a

motion permitted the District Court to base its conclusions on the long period of delay and prejudice to the City, regardless of petitioners' alleged diligence at the time of the dismissal or petitioners' lack of notice in regard to the four and one half years' delay (Pet 3a-4a).

REASON FOR DENYING THE PETITION

THE SECOND CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S ORDER AND JUDGMENT IS LEGALLY CORRECT AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, ANOTHER COURT OF APPEALS OR OTHERWISE WARRANT FURTHER REVIEW BY THIS COURT.

Contrary to the argument of petitioners herein, there is no conflict among the Circuit Courts of Appeals in their treatment of motions to dismiss under Rule 41(b). The discretionary standard is virtually the same in all the Circuits, and the criteria for dismissal are quite similar.

In all Circuits, a dismissal for failure to prosecute is based on the record as a whole and on the totality of the circumstances, which vary enormously according to the complexity of the litigation, the presence or absence of attorneys, and the nature of the delays.

For example, both the Second Circuit and the Ninth Circuit have cited very similar criteria. In the Second Circuit, the Court looks to (1) the length of the delay; (2) whether notice of a possible dismissal was given to plaintiff; (3) whether further

delay would prejudice defendant; (4) the need for calendar control in light of plaintiff's right to be heard; (5) the efficacy of lesser sanctions. See Peart v. New York, 992 F.2d 458 (2d Cir. 1993).

The Ninth Circuit's criteria are "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions." Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447, 1451 (9th Cir. 1994).

These factors are also considered by virtually every other Circuit, in varying degrees of importance, as will be seen by our discussion below. Some Circuits may place more emphasis on one factor over another based on the circumstances in a particular case, but no one factor is the sole consideration in any case, and every case depends heavily on the factual and procedural history of the litigation.

1. A Clear Record of Delay Or Contumacious Conduct

Petitioners claim that there are marked differences in the way the Circuits other than the Second Circuit address the issue of contumacious conduct (Pet. 10-13). However, petitioners misstate the rule in order to shift attention from the true problem with their case, that of the "clear record of delay."

Virtually all the Circuits restrict Rule 41(b) dismissals to cases where there was either a clear

record of delay or contumacious conduct. In Stearman v. Comm'r, 436 F.3d 533, 535 (5th Cir.), cert. denied, 547 U.S. 1207 (2006), a case involving extreme contumacy by the plaintiff, the Court held:

> Dismissals with prejudice for failure to prosecute are proper only where (1) there is a clear record of delay or contumacious conduct by the plaintiff and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile (emphasis added).
>
> In most cases, a plain record of delay or contumacious conduct is found if one of the three aggravating factors is also present: (1) delay caused by the plaintiff; (2) actual prejudice to the defendant; or (3) delay as a result of intentional conduct (emphasis added).

Here, of course, there was a clear record of delay, and actual prejudice to the respondent. In the other Fifth Circuit case cited by petitioners, John v. Louisiana, 828 F.2d 1129, 1131 (5th Cir. 1987), there was neither a clear record of delay or contumacy. The Circuit Court reversed the dismissal for failure to prosecute where the delay amounted to only "a few months aggregate delay," caused by plaintiff's attorney's "ineptitude and procrastination," and found that the longer delays in the case were the result of the District Court's own errors.

In this case, the delays cited by the District Court were due entirely to petitioners' abandonment of the case during the years when they were litigating in the Bankruptcy Court. The Court noted that the delay was altogether unnecessary, as the stay on the District Court action had been lifted in May, 2000, and that action had been reopened in April, 2001.

Petitioners also cite cases from several other Circuit Courts regarding contumacious conduct, but none of the cases cited support their theory of a deep chasm between the Second Circuit and the others. Starting with Herbert v. Saffell, 877 F.2d 267 (4th Cir. 1989), a case where the delay caused by the plaintiffs was minor, and consisted only of failing to file timely status reports regarding their efforts to find an alternative sewage disposal system for the property in question, the District Court's dismissal was found to be an abuse of discretion. The "lackadaisical" behavior of counsel did not either prolong the litigation, or prejudice the defendants. Unlike the situation herein, there was no "drawn out history of deliberately proceeding in a dilatory fashion" (Herbert, supra at 270).

In Lowe v. East Chicago, 897 F.2d 272, 274 (7th Cir. 1990), the case was only one year old when the District Court dismissed it for failure to prosecute because the plaintiff was unable to go to trial without his expert witness who had become unavailable due to the Court's last minute rescheduling. In reversing, the Circuit Court held that a less severe penalty than dismissal should be considered unless "there exists a clear record of

delay or contumacious conduct . . ." (emphasis added).

Cohen v. Carnival Cruise Lines, Inc., 782 F.2d 923, 925 (11th Cir. 1986), held that the dismissal for failure to prosecute was an abuse of discretion where the case was dismissed after only three months, and there was an "absence of clear delay or willful contempt."

Similarly, in Mulbah v. Detroit Bd. of Educ., 261 F.3d 586, 591 (6th Cir. 2001), the Court listed the four factors to be considered in determining whether a dismissal for failure to prosecute should be upheld, and stated,

> While none of these factors is dispositive, a case may be dismissed by a district court where there is a clear record of delay or contumacious conduct on the part of the plaintiff (emphasis added).

In that case, the Sixth Circuit reversed the District Court's *sua sponte* dismissal after only eleven months from the date of the filing of the complaint, holding "there was no significant delay," and no prejudice whatever to the defendant.

Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868 (3d Cir. 1984), affirmed the District Court's dismissal, nine months after filing, noting that "this litigation has been characterized by a consistent delay by plaintiffs' counsel." The Court also noted, contrary to the District Court's finding, that despite counsel's dilatoriness, there was a complete absence of contumacious behavior.

Again, this is similar to the finding of the Court herein, which did not find any contumacy on petitioners' part, nor did the City argue that petitioners' actions were contumacious or in bad faith.

In contrast, Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co., 497 F.3d 1135 (10th Cir. 2007), hinged largely on the bad faith actions of plaintiffs, who withheld their principal from deposition, despite his advanced age and ill health, with the result that his death occurred before he could be deposed. Although bad faith was the primary finding of the District and the Circuit Court, the decision listed the other factors which they normally considered regarding a Rule 41(b) dismissal (Ecclesiastes, supra at 1143):

> (1) the degree of actual prejudice to the other party; (2) the amount of interference with the judicial process; (3) the litigant's culpability; (4) whether the court warned the party in advance that dismissal would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.

Again, this list is virtually identical to the factors considered by the Second Circuit in the matter herein. Thus, although the cases cited by petitioners illustrate various reasons for dismissal under Rule 41(b), none of them hold that a clear record of delay is an insufficient basis for dismissal.

2. Petitioners' Display of Diligence

Petitioners cite a complex class action case; Marks v. San Francisco Real Estate Bd., 627 F.2d 947 (9th Cir. 1980), for the proposition that delay in the past can be excused by recent diligence. In that case, the only delay that could be blamed on the plaintiff was the two and a half years during which he was compiling his list of members of the class action. Thereafter, he encountered several setbacks in decisions from the District Court and the Circuit Court of Appeals, all of which were reversed in the cited decision, noting that he was "assiduous in his prosecution of this action." Marks, supra at 948.

In contrast, petitioners herein were not assiduous in their prosecution, because not only did they (1) forget about it during the several years in bankruptcy court, despite the fact that the stay on the action herein had been lifted in 2000, but (2) both the District Court and the Circuit Court found that they were far from assiduous in the bankruptcy action as well (Pet. 3a, 14a).[1]

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[1] Petitioners' attorney now also claims that he required shoulder surgery in 2004 and back surgery in 2006 (Pet. 4). As he did not bring this to the District Court's attention at any time during the litigation, (until his motion for reconsideration), and failed to mention it in his opposition to defendant's motion to dismiss, the Circuit Court appropriately ignored it, as this Court is free to do. See Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). Accord Leyda v. Alliedsignal, Inc., 322 F.3d 199, 207 (2d Cir. 2003), ("We normally will not reverse a judgment on the basis of an argument that was not made to the district court."); See also Shuaib v. New York City Hous.

Petitioners also cite GCIU Employer Retirement Fund v. Chicago Tribune Co., 8 F.3d 1195 (7th Cir. 1993), for the same proposition, and again, the holding in that case does not conflict with the Second Circuit's decision herein. In GCIU, the delay in the prosecution was for twenty-two months while the parties were engaged in settlement negotiations, and failed to keep the District Court informed. Here, however, petitioners were silent for nearly four and a half years, and were not even diligent in handling their role as an interested party in the bankruptcy action, where the Court found they had caused extensive delays, or in the months following the resolution of that action. The diligence that petitioners claim herein is not comparable to the diligence in the cases cited, where years of complex, vigorously prosecuted litigation more than made up for the periods of apparent inaction.

These two cases do not establish a standard which sets these two Circuits apart from the other Circuits, including the Second Circuit, but rather illustrate the breadth of the Court's discretion in Rule 41(b) motions. Furthermore, petitioners' claim that the Circuit Court "explicitly stated that the Petitioner-Plaintiffs 'were displaying diligence at the time the district court dismissed their action,'" is inaccurate (Pet. 3a). The Circuit Court's decision described petitioners' own argument regarding their diligence, not the Court's assessment of it (Pet. 3a).

Auth. Constr. Dep't, 1998 U.S. App. LEXIS 1228 (2d Cir. 1998) (plaintiff's counsel's claim of serious illness insufficient to overturn District Court's dismissal for failure to prosecute).

3. The Issue of Notice

In Link v. Wabash R. Co., 370 U.S. 626 (1962), this Court held that Rule 41(b) permits a court to dismiss a case for failure to prosecute *sua sponte*, and that neither the absence of notice to the plaintiff, nor failure to hold a hearing on the issue, necessarily offends due process. The only Circuit cited by petitioners as having a strict rule about the necessity of giving notice to the plaintiff prior to dismissing under Rule 41(b) is the Seventh Circuit. However, as even petitioners concede, even the Seventh Circuit does not invariably require it, citing Gabriel v. Hamlin, 514 F.3d 734 (7th Cir. 2008). Another useful case in this regard is Fischer v. Cingular Wireless, LLC, 446 F.3d 663, 665 (7th Cir. 2006), where the Court noted that the requirement of notifying *pro se* litigants had been "softened" from a "must" to a "should" in several cases. In affirming the District Court's dismissal under Rule 41(b), the Court reasoned:

> Leaving the decision to the district courts ensures that dilatory tactics are sanctioned appropriately. The prejudice incurred by a delay in one case may far outweigh that caused in another. Were district courts required to warn litigants before dismissing a case, we would in effect be granting each litigant one opportunity to disregard the court's schedule without fear of penalty regardless of the harm done to other litigants. Such a rule would impermissibly burden the district courts in their efforts to manage their dockets.

Thus, petitioners' argument -- that the Second Circuit's standard for dismissal for failure to prosecute, absent a prior warning, is not followed in the Seventh Circuit -- is without merit. Furthermore, the Seventh Circuit in Fischer also cited cases from the Third, Eighth, and Tenth Circuits that explicitly hold that a warning prior to dismissal is not always required.

4. Delay Caused by Defendant

Contrary to petitioners' argument that the majority of the delay was caused by P.O. Rivera "suddenly" filing for bankruptcy and the automatic stay of the matter herein (Pet. 16), the District Court correctly pointed out that petitioners could have resumed prosecuting this matter as soon as the stay was lifted on May 18, 2000 (Pet. 13a). The Circuit Court agreed, and held that the District Court "did not clearly err in concluding that many of the delays before the bankruptcy court were the [petitioners'] own fault" (Pet. 3a). Petitioners' claim that the City never sought to intervene in the bankruptcy action (Pet. 16), is both misleading and irrelevant to the matter herein, because petitioners have never adequately explained why, once the stay was lifted in 2000, they could not attend to the bankruptcy court proceedings, while simultaneously continuing with this action. [2]

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[2] Petitioners also express indignation that the City did not inform them earlier of P.O. Rivera's death (Pet. 16). However, at the time of Rivera's death on May 18, 2000, petitioners, not the City, were in litigation with Rivera in bankruptcy court, whereas this case had been administratively closed eight months earlier, on September 21, 1999, due to the automatic stay of these proceedings when Rivera filed for bankruptcy.

Petitioners cite Markwell v. County of Bexar, 878 F.2d 899 (5th Cir. 1989), which concerned various matters, including the filing of a motion by defendant that was deemed to be a delay tactic. Here, on the contrary, only the petitioners characterized P.O. Rivera's bankruptcy action as a delay tactic. Also cited is United States v. Inter-American Shipping Corp., 455 F.2d 938, 940 (5th Cir. 1972), where a delay was caused by defendant's failure to serve an answer to the complaint, and the District Court dismissed the complaint without prejudice. The Circuit Court, in turn, vacated the dismissal, noting that a dismissal under Rule 41(b) "generally has been permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff" (citations and interior quotation marks omitted).

As in the previous section, regarding notice, petitioners here only cite cases from one Circuit, and those cases are completely unrelated to the matter herein, nor do they suggest a significant division among the Circuits.

Finally, petitioners claim that only the Second Circuit uses a "wide latitude" standard in permitting the District Court's Rule 41(b) dismissal to stand. However, all the cases cited by petitioners, as noted above, demonstrate that "wide latitude" is an aspect of the judicial discretion, accorded to District Courts in managing their cases. Petitioners have not shown that any other

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Petitioners, thus, were surely in a better position, at the time, to be informed of Rivera's death.

Circuit employs "more stringent standards" than the Second Circuit.

Thus, for all the reasons set forth above, here, viewing the totality of the circumstances herein, where the delay caused by petitioners lasted nearly four and a half years and prejudiced respondents in their defense of the action, the decision of the Second Circuit, affirming the District Court's dismissal of this action under Rule 41(b), is not in conflict with those of the other Circuits (including the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh) under Rule 41(b).[3] In every Circuit, depending on the totality of the circumstances, a clear record of delay can be the basis for a dismissal for failure to prosecute. Therefore, as the decision herein is legally correct, and does not conflict with any decision of this Court or another Court of Appeals, it does not otherwise warrant further review by

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[3] See also Hodge v. American Home Assurance Co., 1994 U.S. App. LEXIS 12428 *5-*6 (1st Cir. 1994):

> Rule 41(b) of the Federal Rules of Civil Procedure expressly authorizes a district court to dismiss a case for failure of the plaintiff to prosecute or comply with . . . any order of court. Dismissal with prejudice is a harsh sanction, which should be employed only when a plaintiff's misconduct has been extreme, and only after the district court has determined that none of the lesser sanctions available to it would truly be appropriate. A finding of extreme misconduct is justified if there is extremely protracted inaction, disobedience of court orders, ignorance of warnings, contumacious conduct, or some other aggravating circumstance such as prejudice to the defendant, glaring weaknesses in the plaintiff's case, and the wasteful expenditure of a significant amount of the district court's time (internal citations and quotation marks omitted, emphasis added).

this Court. See Rule 10, Supreme Court of the United States Rules.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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Respectfully submitted,

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